Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Inquiry Required By The Satellite Home Viewer Extension and Reauthorization Act On Rules Affecting Competition in the Television Marketplace	)	MB Docket No. 05-28

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

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SUMMARY

Retransmission Consent. The most important issue raised by the Public Notice[1] in this proceeding relates to the requirement that multichannel video programming distributors ("MVPDs") obtain the consent of a local broadcast station to retransmit its signal and that both the broadcaster and (now) the MVPD act in good faith in retransmission consent negotiations. The Commission's interpretation of the statutory good faith requirement needs to be clarified in light of a pattern of anticompetitive practices by network-owned and affiliated stations. Because local network stations are "critical to MVPD offerings," "highly valued by consumers" and "without close substitutes," such stations wield considerable power in retransmission consent negotiations. Intolerably, network stations have sought to use this power to insist on conditions in retransmission consent agreements that are anti-competitive and that frustrate important Congressional goals. For example, EchoStar has encountered demands by local network stations that retransmission consent be conditioned upon:

(a) carriage of commonly owned or affiliated cable networks that otherwise would not be carried by the MVPD or would only have been carried as part of a lesser penetrated package – a clear case of *per se* illegal tying under the antitrust laws;

(b) carriage of commonly owned or affiliated broadcast stations in the same market, including low power television stations and satellite stations with duplicative programming, even though such stations would not otherwise be eligible for mandatory carriage; and

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[1] Public Notice, *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, DA 05-169, MB Docket No. 05-28 (rel. Jan. 25, 2005) ("SHVERA Inquiry Public Notice").

(c) carriage of commonly owned or affiliated "Big 4" broadcast stations in smaller markets at above-market rates because of the tie (even though cable operators appear to be paying nothing for the same rights) and/or carriage of commonly owned or affiliated stations in other markets when such stations would not otherwise be carried (even under the must-carry rules) -- each of which constitutes an unjustified leveraging of market power from one market into another.

Such practices need to be curbed. The law already gives the Commission the weapons that are necessary to that end. Section 325(b)(3)(C)(ii) of the Communications Act, 47 U.S.C. § 325(b)(3)(C)(ii), specifies that disparate terms in retransmission consent agreements will not be a violation of the good faith requirement *if* they are consistent with "competitive marketplace considerations." This means that the Commission has full power to find that practices inconsistent with competitive marketplace considerations are such a violation.

Unfortunately, persons interested in engaging in such practices have found comfort in the Commission's pronouncement from the good faith rulemaking that "[w]e do not find anything to suggest that requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration." *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 ¶ 56 (2000). Such parties have interpreted this as an indication of Commission indifference even toward conduct that is a *per se* violation of the antitrust laws. The Commission should once and for all establish that this comfort is false and misplaced. The Commission should either clarify that its 2000 pronouncement was not meant to characterize as good faith bargaining conduct that violates the antitrust laws or else abolish any "presumption" that tying demands are consistent with competitive marketplace considerations.

The problem of retransmission consent abuse is exacerbated by inadequate mechanisms to preserve the status quo pending dispute resolution. Amendments to the Commission's rules are necessary to preserve the status quo pending Commission adjudication, consistent with the procedure the Commission has already established in the *News Corp.-DIRECTV* proceeding. The Commission today has full authority to do this. The Commission should also recommend to Congress that the retransmission consent regime be amended to provide for binding arbitration of retransmission consent disputes, using a baseball-style arbitration framework and with a mechanism requiring both parties to maintain the status quo following the expiry of the retransmission consent agreement and during the arbitration's pendency. This would be another welcome means of minimizing the public interest harms flowing from disputes that result in terminations of viewers' programming.

Another improper practice in the retransmission consent area is the transfer of the right to grant or withhold retransmission consent from the broadcast station to a third party, *e.g.* when a network affiliation agreement gives the network the right to negotiate retransmission consent on behalf of the affiliate, or can otherwise influence the local broadcaster's exercise of its rights. Such practices would concentrate bargaining power in multiple retransmission consent negotiations in a single entity and/or make negotiations subject to the interests of the third party rather than of the local station. This is likely to affect how retransmission consent negotiations are carried out under the "significantly viewed" provisions of the Satellite Home Viewer Extension and Reauthorization Act of 2004[2] ("SHVERA"), and facilitates attempts to leverage

[2] Title IX of Pub. L. 108-447 (2004).

market power from one market into another. Accordingly, the Commission should make clear that the statutory right to grant or withhold retransmission consent is not transferable in any fashion (including *de facto* transfers), and that no third party may influence a broadcaster's exercise of its retransmission rights.

Distant Digital Signals. There is no sunset on cable operators' ability to offer distant digital signals. Yet, satellite carriers' license to provide such signals expires on December 31, 2009. There is no reason for satellite carriers' distant digital signal rights to be time-limited when cable operators' rights are not similarly limited. The Commission accordingly should recommend to Congress that satellite carriers' legal ability to carry distant signals be made permanent. Besides this time limitation, the rules established by SHVERA for the carriage of distant digital signals are substantially different from the rules for cable carriage of the same signals. While cable systems' rights are limited by more extensive nonduplication and other blackout requirements, satellite carriers' rights are limited by the "unserved household" requirement, which is particularly complex for distant digital stations. In general, the unserved household limitation is likely to be a greater limitation on satellite carriers' ability to provide distant digital stations than the more extensive nonduplication and other blackout rules that apply to cable. As this disparity becomes more apparent, satellite carriers' ability to compete with cable may be adversely affected.

Significantly Viewed Stations. Satellite carriers' new ability to offer significantly viewed out-of-market stations is likely to improve their ability to compete with cable operators, which have long had this ability. However, it is too early to fully assess the impact of these provisions on MVPD competition. EchoStar expects that this impact will largely depend on the decisiveness with which the Commission implements the good faith negotiation requirement (as discussed above). In any event, one issue is apparent, namely the December 31, 2008 sunset date for waivers that local broadcasters may grant allowing certain otherwise ineligible subscribers to receive significantly viewed signals.[3] There is no reason for these provisions to expire a whole year before expiry of the other significantly viewed provisions, or to expire at all. Cable operators' ability to provide significantly viewed signals is not subject to the same limitations, let alone an early sunset for any waivers of these limitations. Accordingly, the Commission should recommend to Congress that the sunset date for the significantly viewed waiver provision should either be eliminated altogether or changed to make it coextensive with the sunset of the significantly viewed provisions.

Streamlining of Must-Carry Rules. EchoStar also takes this opportunity to suggest minor changes to the Commission's must-carry election cycle rules that would streamline their performance in practice and ease the burden of compliance.

[3] SHVERA § 102(3) allows only subscribers taking local-into-local service pursuant to 17 U.S.C. § 122 to receive significantly viewed signals, but also permits a subscriber's local broadcaster to waive that requirement.

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COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") hereby responds to the Media Bureau's public notice issued January 25, 2005, seeking comment on the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules.[4] EchoStar is a multichannel video programming distributor ("MVPD") providing satellite television service to over 11 million subscribers nationwide via a constellation of eight Direct Broadcast Satellite ("DBS") service satellites. It is therefore crucially interested in the operation of these rules and their impact on competition in the MVPD market.

I. INTRODUCTION

Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004[5] ("SHVERA") requires the Commission to complete an inquiry and deliver a report to the

[4] Public Notice, *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, DA 05-169, MB Docket No. 05-28 (rel. Jan. 25, 2005) ("SHVERA Inquiry Public Notice").

[5] Title IX of Pub. L. 108-447 (2004) ("SHVERA").

House Committee on Energy and Commerce and the Senate Commerce Committee regarding the impact on competition in the multichannel video programming distribution market of the statutory provisions and Commission rules relating to the retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout. Such report must include recommendations for changes in any statutory provisions relating to these rules. As part of the inquiry, the Commission must also consider the impact of these rules "on the ability of rural cable operators to compete with direct broadcast satellite industry in the provision of digital broadcast television signals to consumers."[6] To this inquiry the Commission has added a request for comments and information regarding how SHVERA's "distant digital" and "significantly viewed" provisions will affect competition in the MVPD marketplace.[7]

II. RETRANSMISSION CONSENT

When Congress confirmed satellite carriers' ability to provide satellite subscribers with local broadcast signals, seeking to help level the competitive playing field between satellite and cable operators, Congress realized that its effort to promote competition among MVPDs would have little meaning if broadcasters were utterly free to withhold their consent to local-into-local retransmissions. Congress accordingly prohibited broadcasters from engaging in exclusive contracts for carriage, and also required them to negotiate "in good faith" for retransmission consent. 47 U.S.C. § 325(b)(3)(C). Congress specified that disparate terms in retransmission consent agreements would not be a violation of the good faith requirement *if* they are consistent with "competitive marketplace considerations," meaning that the Commission has full authority to find that practices inconsistent with competitive marketplace considerations

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[6] SHVERA § 208(a).

[7] SHVERA Inquiry Public Notice at 3.

would be such a violation. In interpreting the "good faith" standard, the Commission has made it clear that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" and that "[c]onsiderations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.'" *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445, 5469 ¶ 58 (2000) ("*Good Faith Report and Order*"). The exclusivity prohibition and good faith negotiation requirements were due to sunset on January 1, 2006. SHVERA extended the sunset date to January 1, 2010 and expanded the good faith negotiation requirement to MVPDs engaged in retransmission consent negotiations.[8]

The Commission's implementation of the statutory good faith requirement needs to be stepped up in light of the way that network stations (*i.e.* those owned-and-operated by, or affiliated with, the major television networks) have actually used or abused their ability to withhold retransmission consent. Because local network stations are "critical to MVPD offerings," "highly valued by consumers" and "without close substitutes," such stations wield considerable power in retransmission consent negotiations.[9] Intolerably, network stations have sought to use this power to demand conditions in retransmission consent agreements that are anti-competitive and that frustrate important Congressional goals.

A. Tying Retransmission Consent to the Carriage of Cable Networks

Powerful broadcasters have tried to leverage their muscle in retransmission consent negotiations to secure carriage of affiliated cable network programming. These attempts

[8] SHVERA § 207(a).

[9] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News Corp.*") at ¶¶ 201-202.

seem to be at the root of two major retransmission consent disputes – Time Warner/Disney in 2000 and EchoStar/Viacom in 2004. In addition, the American Cable Association has filed a petition regarding the impact of such practices on small, rural cable operators.[10]

Typically, the major networks appear to engage in a practice of using their market power over retransmission consent for their local network stations to require carriage of commonly owned or affiliated cable programming networks that otherwise would not be carried by the MVPD or would only have been carried as part of a lesser penetrated package. As EchoStar has submitted in other proceedings,[11] this can be a clear case of a *per se* illegal tie under the antitrust laws. Tying arrangements are *per se* unlawful under Section 1 of the Sherman Act, and thus are prohibited without the need for proof of an unreasonable anticompetitive effect, if (1) there are two separate products with the sale of one being conditioned on the purchase of another, (2) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (3) a not insubstantial amount of interstate commerce in the tied product is affected. *See Northern Pacific Railway v. United States,* 356 U.S. 1, 5-6 (1958).

The first and third prongs of the unlawful tying analysis are easily satisfied here – in each case, the broadcaster is conditioning the sale of one product on another, and there is little doubt that the vast majority of these transactions would satisfy the interstate commerce

[10] *See* Petition for Inquiry into Retransmission Consent Practices, *filed by American Cable Association*, (Oct. 1, 2002); First Supplement to Petition for Inquiry into Retransmission Consent Practices, *filed by* American Cable Association (Dec. 9, 2002). *See also* Reply Comments of American Cable Association, *filed in* MB Docket 02-277 (filed Feb. 3, 2003).

[11] See, *e.g.*, Comments of EchoStar Satellite L.L.C., *filed in the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, at 3-7 (dated July 15, 2004); Complaint, *filed in EchoStar Satellite L.L.C. v. Viacom, Inc.*, No. C 04-0049-CW (N.D. Cal. Jan. 7, 2004).

requirement. With respect to the second prong of the unlawful tying analysis, the network model of exclusive franchises gives only one station in town the right to broadcast each of the four must-have networks. To the extent there was any doubt about the market power of each major broadcasting network, the Commission has now definitively settled that question in the *News Corp.* decision: "News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations. Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult." *News Corp.*, 19 FCC Rcd. at 565 ¶ 201. Additionally, in evaluating EchoStar's antitrust complaint against Viacom last year, the federal district court for the Northern District of California stated from the bench that EchoStar's tying claims (which included its argument that Viacom satisfies the market power prerequisite to a tying violation) had a substantial likelihood of success on the merits.[12]

Notwithstanding this, broadcasters have sought protection for the practice of tying retransmission consent to the carriage of affiliated cable networks based on the Commission's pronouncement in 2000 that: "[w]e do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration." *Good Faith Report and Order*, 15 FCC Rcd. at 5469 ¶ 56. Broadcasters have sought to divorce this statement from the Commission's simultaneous admonition that tying demands are certainly in violation of the good faith requirement if they result from the exercise of market power. *Id.* at 5470 ¶ 58. Based on what seems to be a misinterpretation, many

[12] *EchoStar Satellite L.L.C. v. Viacom, Inc.*, No. C 04-0049-CW (N.D. Cal. Feb. 27, 2004) (order denying continued temporary relief on other grounds). The dispute was eventually settled by the parties.

broadcasters have used the Commission's presumption as cover for conduct that is in fact prohibited by the antitrust laws. Accordingly, the Commission should either clarify that its 2000 pronouncement was not meant to parlay into "good faith" bargaining any conduct that violates the antitrust laws or else abolish any "presumption" that tying demands are consistent with competitive marketplace considerations.

B. Tying Retransmission Consent to the Carriage of Commonly Owned or Affiliated Broadcast Stations in the Same Market

Local network stations have also sought to use their power in retransmission consent negotiations to insist on carriage of commonly owned or affiliated broadcast stations in the same market, including low power stations and duplicative satellite stations, even though such stations would not otherwise be eligible for mandatory carriage.

In more than one market, EchoStar has encountered station owners who have demanded, as a condition of granting retransmission consent for its primary Big 4 network affiliate, that EchoStar also carry the primary station's satellite stations in the same market. Such a requirement would have resulted in EchoStar carrying one or more additional stations that typically carry a duplicate simulcast feed of the programming of the primary network station. EchoStar has also encountered situations where the local network station demanded carriage of an affiliated low power station as a condition of retransmission consent for the network station.

Both kinds of conduct are objectionable because they involve the exercise of market power in relation to retransmission of the local "Big 4"-affiliated stations. Mandatory carriage does not extend to such stations; under section 339(d) of the Communications Act, 47 U.S.C. § 339(d), a satellite carrier is not required to carry commercial television broadcast stations that substantially duplicate the signal of another local commercial television station.

Moreover, low power television stations are not eligible for must-carry.[13] Such demands effectively thwart the satellite carriers' attempts to introduce additional MVPD competition by expanding local satellite service to as many new local markets as possible.

Such conduct should be prohibited as a violation of the good faith bargaining requirement. But once again, the Commission's general statement that tying arrangements are presumptively consistent with competitive market considerations is open to misinterpretation and provides cover for broadcasters to engage in such practices, even though it is clear that such conduct is the result of the exercise of market power in a manner that distorts competition and frustrates the limits Congress placed on mandatory carriage. The Commission should clarify that this was not its intent.

C. Tying Retransmission Consent to the Carriage of Commonly Owned or Affiliated Broadcast Stations in Other Markets

EchoStar has also encountered instances of network affiliate owners demanding that retransmission consent of a Big 4 network affiliate in one market be tied to carriage of commonly owned or affiliated "Big 4" broadcast stations in smaller markets at above-market rates because of the tie, even though it appears that cable operators are not paying anything for the same rights. In other instances, network affiliate owners have demanded carriage of one or more low power stations in other markets that are ineligible for satellite must-carry. They have also sometimes demanded carriage of full power independent or non-Big 4 network stations in other markets that otherwise would not have been carried during the current must-carry election cycle.

[13] *See* 47 U.S.C. §§ 338(a)(3) (carriage of low power stations optional), § 338(k)(8) (defining "television broadcast station" by reference to § 325(b)(7), which excludes low power stations).

Such conduct is simply the unjustifiable leveraging of market power from one geographic market into other geographic markets and, again, a *per se* illegal tie under the antitrust laws. The local network affiliate is attempting to use its power over retransmission consent in one market to obtain carriage and extract rent from the MVPD (and its subscribers) in other markets where it would not otherwise be able to do so.

Accordingly, such arrangements should also be considered violations of the "good faith" bargaining requirement, and the Commission's precedent on retransmission consent should be clarified accordingly to reflect this.

D. Retransmission Consent Dispute Resolution

Competition and diversity in the MVPD market are also threatened by the ability of broadcasters to pull the plug on retransmission pending the resolution of a dispute. While EchoStar sometimes has no choice but to accede to some of the unreasonable tying demands made by broadcasters, such demands also sometimes result in EchoStar having to drop carriage of a local network station or having to launch local service in a market without the Big 4 affiliate that is the subject of the demand.

Serving a local market with less than a full complement of the Big 4 local affiliates, which most MVPD subscribers unfailingly demand, harms an MVPD's competitiveness. There is no adequate substitute for the missing network affiliate, and in EchoStar's experience, customers have a strong incentive to purchase MVPD services from a provider that can offer all four affiliates rather than an MVPD with an incomplete local package. The Commission acknowledged this fact in its *News Corp.* decision, observing that "temporary withdrawal of . . . local broadcast television station signals would cause a significant number of customers to shift from their current MVPD, which is subject to the foreclosure, to [another MVPD]." *News Corp.*, 19 FCC Rcd. at 514 ¶ 87; *see also id.* at ¶¶ 208-09 (analyzing data on subscriber shifts during a retransmission consent dispute in Houston between ABC and Time Warner). Thus, the MVPD with an incomplete local package suffers the financial harm of lost subscriber fees as its customers shift to other MVPDs, as well as the irreparable, intangible harms of damaged reputation, loss of goodwill, and loss of prospective customers.[14] That MVPD's ability to compete with others offering a complete local service is compromised, leaving consumers with fewer comparable MVPD services from which to choose.

The upshot is that broadcasters' unbridled ability to wield the threat of programming termination over MVPDs significantly shifts the balance of bargaining power in retransmission consent negotiations. While it may be argued that a fear of not being carried on an MVPD might adequately incentivize broadcasters to reach a retransmission consent agreement, such an argument is not realistic. An MVPD's ability to decide not to carry a broadcaster's signal is limited by both rule and practicality. First, an MVPD can seldom refuse to carry a broadcast station because a broadcaster failing to reach retransmission consent agreements can always fall back on must-carry if it decides that carriage on an MVPD is critical to its business. Second, in addition to mandatory carriage on the distributor's system at the next cycle, the broadcaster has at least two other MVPD retransmission outlets, as well as over-the-air service. The MVPD, on the other hand, has only one local NBC, or CBS, or ABC, or Fox station from which to obtain retransmission consent. Thus, the prospect of MVPDs enjoying equal bargaining power through an ability to threaten not to carry the broadcaster is illusory. Finally,

[14] *See, e.g., Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (an "irreparable" harm is one that cannot be remedied by money damages). The federal district court for the Northern District of California endorsed a claim of such irreparable harm in granting EchoStar's initial request for temporary relief in its retransmission consent dispute with Viacom. *See* n. 12, *supra*.

as discussed below, EchoStar does not object to a reciprocal obligations on both broadcaster and MVPD not to terminate retransmission during a dispute.

Despite the recognized irreparable harm that would flow from an MVPD's loss of one of the Big 4 network affiliates in a local market, and the resulting harm to consumers that would flow from diminished MVPD competition and diversity, the Commission's retransmission consent rules do not provide a mechanism for averting this harm. To address this deficiency, broadcasters and satellite carriers alike should be prohibited from withholding or discontinuing access to local broadcast signals pending resolution of a retransmission consent dispute. The Commission has the power to require this. Indeed, the Commission has already established just such a framework in the *News Corp.* case to remedy its concern that the ability to threaten withholding of programming afforded the programmer a "substantial" advantage in bargaining power. *News Corp.*, 19 FCC Rcd. 473 at ¶¶ 175, 204, 206-209. Given the recent trend of more relaxed media ownership restrictions, which has enabled individual entities to control more and more programming in the same and different markets, there is ample reason not to limit this condition to the *News Corp.* case, but to make it applicable to all broadcasters.

The Commission should also recommend to Congress that the retransmission consent regime be amended to provide for binding arbitration of retransmission consent disputes using a baseball-type arbitration framework. As part of the arbitration regime, both sides should be prohibited from shutting off programming to subscribers after the expiration of the retransmission consent agreements and pending arbitration. In *News Corp.*, the Commission characterized such a regime as a means of alleviat[ing] public interest harms" that could potentially arise from a retransmission consent dispute," explaining that it would "provide a fair and neutral mechanism by which disputants can quickly resolve retransmission consent disputes." *Id.* at ¶ 220. The Commission further explained that the arbitration mechanism in *News Corp.* would "limit News Corp.'s incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs." *Id.* The arbitration mechanism would have a similar effect with respect to retransmission consent negotiations generally, regardless of whether the broadcaster has a distribution arm, because any threat of program withholding by the broadcaster would be tempered by the knowledge that mandatory arbitration would soon put an end to the dispute.

E. Restrictions by Third Parties on the Exercise of Retransmission Rights That Are Anticompetitive or That Frustrate the Goals of SHVERA

Efforts to discourage anticompetitive conduct by broadcast station owners in retransmission consent negotiations would be incomplete without the imposition of similar restrictions on any third parties having the ability to influence the conduct of station owners. This safeguard is particularly important in the broadcast network-affiliate context, where the network may limit an affiliate's ability to engage in certain actions, including the local broadcaster's right to grant retransmission consent. It was the recognition of such influence that led the Commission to extend the retransmission consent conditions in the News Corp. merger approval to not only the local affiliates owned and operated by News Corp., but to those situations where the network is able to "intervene" in affiliates' retransmission consent negotiations. *See News Corp.* 19 FCC Rcd. at 522 ¶ 218.

EchoStar is aware that, to date, such circumstances have occurred more frequently in the cable context. But as satellite providers seek to receive retransmission consent rights for significantly viewed stations, for example, it is essential to discourage these practices in their incipiency. The Commission should therefore clarify that the statutory right to grant or withhold retransmission consent is not transferable in any fashion (including *de facto* transfers), and that no third party may influence a broadcaster's exercise of its retransmission rights.

F. Permanent Ban on Exclusive Agreements for Retransmission Consent

When Congress adopted the ban on exclusive agreements for retransmission consent, it did so in recognition of the fact that permitting a broadcaster to make an exclusive deal allowing its signal to be carried by only one MVPD in its market would utterly defeat the goals of fostering MVPD competition. *See Good Faith Report and Order* at 5475 ¶ 69. At the same time, however, Congress decided that the exclusivity ban would be of a limited duration. Although SHVERA renewed the exclusivity ban, there is no reason for the ban not to be permanent. The rationale for the ban -- the need to ensure that all MVPDs have access to all local broadcast signals in a market -- has not changed. Nor is there any reason to believe that the marketplace of the future will be such that it would be desirable for broadcasters to have the ability to cut most MVPDs out of obtaining the broadcaster's signal. As the Commission has found, local broadcast stations are "critical to MVPD offerings," "highly valued by consumers," and "without good substitutes."[15] Indeed, as noted above, failure to carry even one local network station can have a serious effect on an MVPD's competitiveness. This state of affairs is likely to continue indefinitely into the future.

In 2002, the Commission decided to extend the program exclusivity rules in the program access context to ensure that new entrants and competing MVPDs can continue to get access to programming that is "vital to the success of new entrants and competitive MVPDs." *Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section*

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[15] *News Corp.*, 19 FCC Rcd. at 565 ¶¶ 201-202.

628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition, 17 FCC Rcd 12124, 12136 ¶ 26 (2002). As the Commission found, "an MVPD's ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists." *Id.* at 12139 ¶ 34. The same would be true if MVPDs were to be denied access to local broadcast stations and local network stations in particular. Accordingly, the Commission should recommend to Congress that the ban on exclusive retransmission consent agreements be made permanent.

III. DISTANT DIGITAL STATIONS

Currently, the satellite distant signal provisions are set to expire on December 31, 2009[16] while the legal right of cable systems to retransmit such signals is permanent. There is no reason for satellite retransmission of distant signals to be fettered in a way that cable retransmission of the same signals is not. Accordingly, the Commission should recommend to Congress that satellite carriers' legal ability to carry distant station signals (whether analog or digital) should be made permanent.

The Commission should also continue to monitor the continuing disparity in the treatment of satellite and cable distributors and its impact on competition. SHVERA creates a complicated set of new rules for satellite carriage of distant digital signals[17] that are very different from the rules that apply to cable carriage of such signals (or even satellite carriage of distant analog signals). Cable operators are currently authorized to offer distant digital signals to everyone within their service area, subject to nonduplication and blackout rules within particular

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[16] *See* Section 4(a) of the Satellite Home Viewer Act of 1994, 17 U.S.C. § 119 nt, as amended by SHVERA § 101.

[17] *See generally* 47 U.S.C. § 339(a)(2)(D).

zones of protection. In contrast, satellite carriers are subject to more limited nonduplication and blackout rules, but can currently only carry distant digital network signals to households predicted to be unserved by the local network station's *analog* signal, and then only if certain conditions are met depending on whether local-into-local service is being offered. Starting in April 30, 2006, satellite carriers' ability to carry distant digital signals will also be based on digital signal strength testing. While it is difficult to compare the different rules and their impact on MVPD competition, EchoStar believes that cable operators generally will have the ability to provide distant digital signals to a greater proportion of their subscribers in each local market than satellite carriers. As this disparity becomes more apparent, satellite carriers' ability to compete with cable operators may be adversely affected.

IV. SIGNIFICANTLY VIEWED STATIONS

Without question, satellite television will become more competitive with cable as a result of its new ability to begin offering significantly viewed stations under SHVERA.[18] However, it is premature to predict in any greater detail the likely impact of this authority on MVPD competition because neither EchoStar nor DIRECTV has begun to offer significantly viewed stations in any market. EchoStar expects that this impact will depend heavily on the decisiveness with which the Commission implements the good faith negotiation requirement (as discussed above).

Moreover, one issue that is apparent now is the sunset date for waivers that local broadcasters may grant allowing certain otherwise ineligible subscribers to receive significantly

[18] *See* 47 U.S.C. § 340 and 17 U.S.C. § 119(a)(3), *inserted by* SHVERA §§ 102, 202.

viewed signals.[19] The waiver provision (and the waivers themselves) expire on December 31, 2008 – a whole year before the sunset of the significantly viewed station license. There is no reason that broadcasters' right to grant waivers should expire an entire year before the significantly viewed provision terminates. Indeed, the waiver provision should not expire at all, considering that the cable operators' ability to provide significantly viewed signals is not subject to the same limitations, let alone an early sunset for any waivers of those limitations. Accordingly, the Commission should recommend to Congress that the sunset date for the significantly viewed waiver provision should either be eliminated altogether, or at the very least, changed to make it coextensive with the license for carriage of significantly viewed and distant stations.

V. STREAMLINING OF MUST-CARRY ELECTION RULES

Prior to each must-carry/retransmission consent election cycle, satellite carriers are required to respond to a television station's request for carriage within 30 days of receiving such request and state whether it accepts or denies the carriage request. This process can be quite cumbersome when it has to be repeated in hundreds of local markets. EchoStar suggests that this process can be streamlined in two ways.

First, the Commission should set up an electronic "clearing house" system by which television stations can make carriage requests and by which satellite carriers can send responses. This would significantly reduce burdens on both broadcasters and satellite carriers and cut down on mailing errors and disputes over the timeliness of carriage requests and responses.

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[19] SHVERA § 102(3) allows only subscribers taking local-into-local service pursuant to 17 U.S.C. § 122 to receive significantly viewed signals, but also permits the subscriber's local broadcaster to waive that requirement.

Second, the Commission should establish a default response with respect to any television station that (1) previously requested must-carry for the current election cycle, (2) is currently being carried by the satellite carrier, and (3) makes the same carriage request for the next election cycle. In such circumstances, it can be presumed that the satellite carrier will accept the station's carriage request for the next election cycle unless it affirmatively indicates otherwise. Accordingly, the Commission should relieve satellite carriers of the obligation to respond to such a television station's carriage request unless they wish to deny carriage. This default response can be built into any electronic system that the Commission establishes for processing carriage requests and responses.

VI. CONCLUSION

EchoStar urges the Commission to take the foregoing comments into account in its report to Congress under section 208 of SHVERA and in implementing the statutory good faith requirements.

Respectfully submitted,

/s/

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